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DIVISION II
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No. 49569-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CHEHALIS CHILDREN'S CLINIC, P.S.,

Appellant

v.

WASHINGTON STATE HEALTH CARE AUTHORITY,

Respondent

REPLY BRIEF OF APPELLANT

May 18, 2017

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ORIGINAL

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42 U.S.C. 1396a(bb)(5)(A); Title XVIII, Section 1902(bb)(5)(A) of the Social Security Act	3
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Washington Administrative Code

WAC 182-549-1100	1
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I. ARGUMENT

In the introductory statement of Brief of Respondent, the Health Care Authority (HCA) makes a false claim that Appellant (CCC) does not dispute the fact that it was overpaid by HCA. CCC has claimed it was not overpaid from the beginning of the administrative appeal process and has never wavered in that position.¹ In fact CCC claims it did not receive all the enhancement payments it should have been paid. But that is not the issue on appeal because it is not something that can be appealed by CCC. As stated by Administrative Law Judge Whitehurst in her Initial Order at ¶5.5 the ALJ may not decide that a rule is invalid or unenforceable.² Because the issue initially raised by CCC that the overpayment claimed by HCA is not properly assessed requires a determination of the invalidity or unenforceability of the operative WAC, the issue of overpayment is not properly raised on appeal and for that reason, CCC does not address the issue of correctness in the reconciliation process, whether the claimed overpayment is correct or not and whether the HCA follows its own State Plan in determining the methodology in WAC 182-549-1400(12); which CCC claims it does not.

The only issue on appeal is whether equitable estoppel

1 CP 54, AR 103-104 wherein CCC states its primary objection is the enhancement reconciliation methodology is not appropriate given the guidance of WAC 182-549-1100 and WAC 182-549-1400(12) and disputes owing any money to HCA and claims HCA owes money to CCC; See also AR 66 at ¶2.1 and 4.1; See also CP 55, Verbatim Report of Proceedings (RP) page 4, line 21 – page 6, line 5.

2 CP 54, AR 50

precludes collection of the claimed overpayment. CCC objects to the HCA throwing out a red herring as to the overpayment issue, and hereby preserves that objection throughout this Reply as to all instances where HCA makes such statement such as at pages 12³ or 18⁴ of Brief of Respondent. These statements are not correct, misstate the position of CCC and should not be considered by this Court.

REPLY TO HCA COUNTERSTATEMENT OF THE ISSUES:

As to the HCA's counter-statement of issues at page 2 of Brief of Respondent, CCC replies as follows:

(a) CCC does not concede it was overpaid;

(b) It is immaterial to this appeal that the Legislature reduced the amount of claimed overpayment and has written off nearly \$138,000 of the overpayment with the exception that it goes to prove element #5 of equitable estoppel in that precluding collection of the claimed overpay will not impair government functions. Had the Legislature been concerned about impairment of government functions, it is quite unlikely it would have made such blanket reductions as to all such claimed overpayments against all the Rural Health Clinics in the State.

(c) Whether CCC reasonably relied upon any expectation of never being subject to an audit by HCA is not an issue in this appeal. The question is whether CCC reasonably relied upon

³ "Chehalis does not challenge the conclusion that it was overpaid by more than \$212,000 and that the final amount owed to the State is more than \$74,000.

whether the payments made to CCC were accurate when made. There is no evidence in the record that CCC (or anyone else) should have believed the payments would not be accurate; even the HCA would have assumed their payment was accurate when made. The fact that there would be an audit does not assume inaccuracy or that no one should question accuracy of the payments. Additionally, it is the duty of the HCA to perform a reconciliation audit annually the year after payments of enhancements⁵ not 5 years later⁶. There can be no misunderstanding that the State Plan requires an annual reconciliation each year after payment of enhancements or that the HCA understood that reconciliation audits were to occur the year after payment.

(d) it is a manifest injustice to require Chehalis to repay money that it believed it was entitled to keep⁷; and

(e) applying equitable estoppel will not impair HCA's exercise of its governmental functions to ensure compliance with federal law regarding proper levels of Medicaid payments. First, the Legislature wrote off over 65% of the any claimed overpayments to all RHCs, so it obviously wasn't concerned about impairment of government function; second, there is nothing in the record to support the claim by HCA

4 "Chehalis does not argue that HCA's determination of the overpayment was incorrect or that HCA is violating the statute."

5 CP 54, AR 125; State Plan Amendment (SPA) at page 5: "To ensure that the appropriate amounts are paid to each clinic, the State will perform an annual reconciliation and verify the enhancement payments in the previous year were in compliance with Section 1902(bb)(5)(A). (*Underlining made by Appellant*).

6 CP 54, AR 127; "the 2009 reconciliation, which will be done in September 2010."

7 CP 54, AR 48 (¶4.33) and AR 56 (¶5.26) of Initial Order.

that CMS has requested or even expects to be repaid; third the conclusion by ALJ Whitehurst is instructive in her comment that “the application of equitable estoppel in this case might actually improve government functions.”⁸

REPLY TO HCA FINDINGS OF FACT:

1. Finding of Fact 8: CCC agrees that enhancements are paid in addition to encounter rates. That has been the basic claim by CCC from the beginning. If something is paid in addition to something else, then it defies logic that the something else could be deducted from the amount paid in addition. By the very definition of enhancements and encounters, enhancements are paid in addition to encounters.⁹

2. Finding of Fact 11: It is disingenuous for the HCA to argue there is nothing in federal law to require a time-frame on the reconciliation; that requirement comes from the SPA and is even stated to the Financial Directors of each RHC by the HCA RHC Program Director on July 29, 2009. *See footnote 5&6 of this Reply.*

CCC again states that it has not failed to challenge the overpayment nor does it concede any overpayment; for the HCA to state otherwise is wrong.

3. Finding for Fact 12: CCC does not overlook plain language of the definition of enhancements and encounters as stated above in reply to Finding of Fact 8 and does not overlook the plain language of the SPA; enhancements (or supplemental payments) are in addition to encounters. The requirement under federal law, CMS guidance and

8 CP 54, AR 56 (¶5.27)

the SPA is to make sure the enhancements are at least equal to encounters. There is no requirement to take away (recoup) any enhancements paid in addition to encounters; that would be an absurd conclusion at any rate. Again, enhancements are paid in addition to encounters.

The HCA makes the incredible argument that CCC has not argued or proven that CMS has taken any adverse action against HCA in connection with HCA's adherence to the statute and SPA. That argument misses the point; the point is that CMS has not taken any action to recover any alleged overpayments and HCA hasn't proven that CMS is even looking to recoup any of the federal aid that it has provided to HCA for the Clinics to provide medical services to their economically disadvantaged clients. However, since HCA brings up this issue for the first time, it is instructive that the recent federal budget passed by the House on May 3, 2017 provide the following guidance to CMS.¹⁰

4. Finding of Fact 20: Again, see footnotes 5&6 in the Reply.

5. Finding of Fact 30: CCC does dispute it was overpaid as has been pointed out previously in this Reply.

9 CP 54, AR 67-69 (¶4.1)

10 The Committee request CMS provide a report within 120 days of enactment on State Medicaid payment methodologies for facilities designated as RHC. The report should identify any State, which uses a methodology that includes a reconciliation process that may result in the recoupment of funds from a RHC. For each State so identified, the report shall: (1) describe the legal basis for recoupment and the conditions governing it, including any Federal requirements; (2) estimate the proportion of any potential recoupment that would be owed by the State to the Federal government; and (3) describe any options available under Federal law to retroactively eliminate, reduce, or otherwise mitigate the impact of

EQUITABLE ESTOPPEL

1. Reasonable Reliance: The expectation of enhancement payments being audited does not set up an expectation that the payments were incorrect when made. Even the HCA believed it was making the correct payment when made. It was reasonable for CCC to rely upon the correctness of the payments they received. As found by ALJ Whitehurst, CCC reasonably relied upon the payments made by HCA.¹¹

2. Manifest Injustice: Again, CCC has continually challenged that it was overpaid and instead believes it was underpaid as shown earlier in this Reply. See conclusion of law 5.26 in the Initial Order of ALJ Whitehurst for a compelling reply to the HCA position Brief of Respondent.¹²

3. Impairment of Governmental Functions: First, as CCC has argued previously, the purpose of the reconciliation is to make sure the RHC was paid at least equal to PPS; not to recoup any payments paid above PPS. HCA has provided no proof in the record that CMS requires repayment or that it is even asking for repayment. See also CCC argument in this Reply at pages 3 and 4 and footnote 8.

II. CONCLUSION

CCC has continued to prove by clear and convincing evidence

such recoupment on RHC, including the actions necessary to pursue such options.

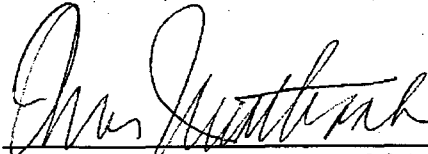
11 CP 54, AR 54-56 (¶5.24)

There is not a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the HCA Board of Appeals Review Decision and Final Order and this Court should provide the relief requested in the Brief of Appellant.

DATED this 18th day of May, 2017.

Respectfully submitted,

RODGERS, KEE & CARD, P.S.

A handwritten signature in black ink, appearing to read "Thomas J. Westbrook", is written over a horizontal line.

Thomas J. Westbrook, WSBA #4986
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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

The undersigned certifies that on the 18th day of May, 2017 she AR caused service of this Reply Brief to be made upon the Respondent by US Mail, postage pre-paid and by e-mail to:

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Dated this 18th day of May, 2017.

Catherine Hitchman
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